
Advisory Task Force on Remote Access to and Privacy of Electronic Court Records
<http://www.in.gov/judiciary/admin/3389.htm>

Indiana Government Center South, Conference Room A

402 West Washington Street

Indianapolis, IN

June 3, 2016

12:00 – 2:00 PM

MINUTES

ATTENDANCE: *Chair:* Hon. Loretta H. Rush. *Members:* Melissa Avery, Prof. Fred H. Cate, Kenneth J. Falk, Christine Hayes Hickey, Lilia G. Judson, Stephen Key, Jon Laramore, Hon. Peggy Lohorn, Kelly McBride, Rep. David Ober, David N. Powell, Prof. Joel Schumm, Debra Walker, Hon. Mary G. Willis. *Staff:* Justin P. Forkner. *Absent:* Larry A. Landis, Rep. Sharon Negele.

MEETING SUMMARY: The Task Force received a demonstration on prospective ‘notices of public accessibility’ for e-filers, and a survey of state practices regarding public online access to court records. The Task Force reviewed the results of the online survey submitted to the Task Force members after the May 3, 2016, meeting, and discussed whether public online access to pleadings and orders should be made available for non-confidential case types. The Task Force also discussed whether public online access should be provided with respect to financial information such as fees, costs, and judgments.

The following votes and/or action items were taken:

- the Task Force voted to recommend allowing online access to attorneys/parties to all orders and filings in all case types – both confidential and non-confidential – except access to a party other than the State in a criminal matter would occur only after charges are filed;
- the Task Force voted to recommend allowing online public access to orders in the Infraction (IF), Ordinance Violation (OV), Small Claims (SC), Civil Collection (CC), Civil Tort (CT), Civil Plenary (PL), and Mortgage Foreclosure (MF) case types;
- the Chief Justice asked all Task Force members to take the survey results back to their constituent groups and be prepared to discuss the remaining case types at the next meeting; and
- the Chief Justice asked for a discussion at the next meeting as to what financial information the county clerks would prefer to see, or not see, available to the public online, based on feedback given at the clerks’ annual meeting.

I. Welcome

The meeting began at 12:06 p.m. The Chief Justice noted that there were two meetings remaining and that she might not be able to make the July 29 meeting but Justice David would be able to chair it. A motion was requested to approve the minutes from the May 3, 2016, meeting. Such a motion was made, seconded, and approved.

II. Progress Reports and Demonstrations

The Chief Justice discussed messaging efforts to attorneys and judges regarding e-filing and Court technology endeavors, and asked for Task Force members to submit ideas to Kathryn Dolan and the Court on further messaging needs.

A. Notice statement to e-filing attorneys about public accessibility: Report by Mary DePrez and Greg Pachmayr

Mary DePrez presented options for providing notice to e-filers that filed documents could be made available to the public online. She presented screenshots from the landing page of the State's free e-filing system with proposed language, an information pop-up bubble that filers can check to assess the type of document being filed with additional language, and a final e-filing page where the filer must affirmatively acknowledge certain Court concerns; an additional box had been added to provide notice of public availability of e-filed documents.

The Task Force discussed the proposed language, including the use of the word(s) "posted/posting" when the Court is not "posting" documents – the documents are simply being made accessible. Proposed alternatives included that the documents "might be made available by any means approved by the Indiana Supreme Court," "made accessible to the public," "available electronically," or "will be publicly available." The final language proposal was "may be made publicly available online."

Bob Rath presented the Federal notice language from PACER. It was an excessively long notice paragraph.

B. Other State practices on public access to criminal filings: Report by Jeff Wiese

Jeff Wiese provided an update to the survey presented at the Task Force's April 8 meeting on information posted by additional jurisdictions and the federal system. The update was to specifically address criminal records. He noted that only Florida treated criminal cases differently, in that individuals could only access pre-conviction criminal proceedings if the individual knew the case number. Many of the other states, though, controlled access based on user type – online users must subscribe and access is provided differently for the public, attorneys generally, attorneys of record, and parties – and charged

fees to prevent the “nosy neighbor” from accessing records online. He provided a chart identifying these distinctions by jurisdiction.

He also noted that several states are re-evaluating their current practices based on changes in technology and lessons learned as access is provided or limited. The Chief Justice pointed out that despite the activities of the National Center for State Courts, there is no “best practice” identified or even a good accounting of state practices.

III. Issues for Discussion and Recommendation

A. Review questions and responses from survey: Report by Justin Forkner

Justin Forkner presented the results of the Online Access Survey submitted to the Task Force members after the May meeting. With respect to the survey results, he noted that seventeen members of the Task Force provided responses but for a variety of reasons they did not vote on each of the forty-two case/document types. The numbers in the results therefore reflect the raw vote totals on each decision point and not a percentage of the total Task Force members or percentage of survey respondents.

The results of the survey showed that there was a general consensus (roughly 65% agreement) in favor of allowing online public access to orders in thirty-one of the case/document types, general consensus in prohibiting online public access to orders in eight of the case/document types, and no consensus as to three of the case/document types. There was also general consensus in favor of allowing online public access to pleadings in eleven of the case/document types, general consensus in prohibiting online public access to pleadings in fourteen of the case/document types, and no consensus as to seventeen of the case/document types. There was also general support for restricting online access to parties and attorneys in twenty-one of the case/document types.

Justin Forkner pointed out some challenges in interpreting the survey responses. First, with respect to orders, some of the case/document types do not result in an “order” at all – and it was not otherwise clear whether that term would refer only to final orders, to include judgments of conviction, or would also encompass orders on intermediate matters. With respect to pleadings, under the trial rules that specific term incorporates only five types of documents but the survey was intended to be broader and encompass all non-order/judgment filings, and also the survey did not distinguish between whether access would be granted as the pleadings were filed or if it was intended to provide access only once a final order/judgment is entered. He also noted that where the respondents showed consensus on prohibiting online public access – or were split on the matter – those results correlated to a higher number of votes in favor of allowing restricted access to parties and attorneys.

The Task Force discussed the particular challenges of ex parte matters and Miscellaneous Criminal (MC) cases. The Chief Justice pointed out that the purpose of ex parte was because there was insufficient time to provide notice to the other party; online access might actually ameliorate that lack of notice issue. Lilia Judson noted that an ex parte proceeding is not, in and of itself, confidential, so an ex parte filing should not automatically be kept from online access. David Powell said that in practice ex parte proceedings still occur even when notice is not an issue – particularly in the criminal arena with things like psychiatric evaluations of defendants anticipating an insanity defense. Melissa Avery also mentioned that in civil matters, there is sometimes concern that an ex parte motion is filed in order to prevent a harm from occurring and a party might commit those harms once it sees the motion is filed. The Chief Justice said that the perception the Task Force should be striving to reach is one of online access promoting transparency and openness, not the other way around, and the general rule should be that for parties and attorneys everything is accessible.

The Task Force voted and agreed to recommend that attorneys and parties should always have full access to all pleadings and filings – but in the criminal arena, access to a party other than the State would be allowed only once charges are filed (i.e., Miscellaneous Criminal (MC) cases would not be available pre-charge). This was later clarified to include both confidential and non-confidential cases.

An issue is providing the technological capability to distinguish between categories of users online; Mary DePrez said the capability has not yet been developed and doing so would be a substantial project once Court Technology gets that direction from the Court – it might take more than a year to complete. She stated that Tyler Technology was piloting a portal that would permit user registration and create that sort of distinction between users. She also said that it was possible, on Odyssey, to simply turn off the CCS for MC cases from going straight online and that might alleviate prosecutor concerns from that information becoming publicly accessible pre-charge.

The Task Force then discussed whether to recommend, in criminal cases, that the switch be turned off completely for search warrants and pre-charging information. The members discussed the potential consequences of those items being public – to the citizen who might need to know that his neighbor is suspected of a crime; the lawyer who might be able to advise a client to turn himself or herself in; the defendants who might dump contraband, eliminate a potential law enforcement source, flee, or obtain weapons; the officer then sent to execute the warrant.

Judge Willis discussed that the requirement was for a prosecutor to file a motion to seal the warrant information, but that in smaller counties this could

have the opposite effect because nothing created more attention than holding a hearing on a motion to seal a warrant. She also said that savvy defendants do, in fact, track their names on MyCase. She noted that several practical work-arounds currently exist to keep these documents practically obscure, including by filing late in the day on a Friday and executing the warrant over the weekend knowing that the warrant wouldn't actually be entered until Monday morning. Dave Powell also talked about the challenges of larger counties, where such motions to seal are impossible because the case-load is too great and the operation of the prosecutor offices is too layered.

Steve Key asked why this motion couldn't be a form, just like the warrants are forms. Dave Powell said the motion to seal created an entire proceeding separate from the warrant; it wasn't something that could just be filed and granted with a form.

Mary DePrez mentioned that prosecutors have complained about this information being posted already, particularly from Floyd County, where media would track these filings and sometimes be present when the officers arrived to execute the warrants. In Marion County, she said, the prosecutors were concerned that the defendants were fleeing ahead of the warrants because they had identified it as being posted. She also said that Odyssey can label the target of the warrant as either a "participant" or a "party" – if a participant, no information identifying the individual would be posted (just the MC case identifier), but different counties do things different.

Professor Cate suggested that the issue might be the need to presumptively seal all search warrants, and the primary privacy concern is for people who are subject to search warrants and are never eventually charged. He posited that this was a stronger approach than trying to identify work-arounds or limits on online access vs. practical obscurity. Ken Falk said this might need to be a legislative fix, or a rule fix, rather than the Task Force trying to create artificial barriers to access to ameliorate concerns. Dave Powell believed that Administrative Rule 5 and Administrative Rule 9 are not necessarily congruent; the Records Management Committee or Rules Committee was taking up this question at its next meeting – this and the question of what is a case, and what isn't a case, needed to be addressed. Steve Key mentioned the press issue isn't normally driven by tips from reading online CCS entries that are automatically posted – normally it's when a neighbor contacts the press to ask what's going on when the police arrive – so perhaps instead the online posting could be time-delayed. Mary DePrez wasn't sure if that was possible by case type, but could find out for the next meeting.

The Chief Justice said if the Rules Committee was examining the broader question, then she would prefer to let them do that first and focus the Task Force on any particular outlier issues. She asked for a report on the outcome

of that body and/or the Records Management Committee at the next Task Force.

The Task Force then discussed how protective orders would be addressed with access for attorneys and parties. Mary DePrez said that right now, protective orders are not on MyCase or in the e-filing system because of federal requirements; they are only in the Protective Order Registry and how that system meshes with e-filing has not been resolved.

The Task Force then reviewed the presentation again. Professor Schumm spoke about the value—him seeing none—in providing public online access to any pre-conviction criminal pleadings, filings, or orders. There was, he believed, too much of a threat to the sanctity of the criminal justice process and the presumption of innocence, the fairness of the trial, and the integrity of the jury.

Steve Key questioned whether limiting online access would really fix any of those issues if the documents were still publicly accessible in the courthouse—and how many people exactly would be online trolling for pre-conviction criminal documents. Professor Cate agreed, believing it counter-intuitive to provide transparency through online access only after “justice was done.”

Dave Powell brought up the challenges of, for example, motions to suppress where evidence is excluded and how jurors could then go online and see that evidence being suppressed; they then could see inadmissible evidence and base conviction questions on that. Professor Cate said the U.S. Supreme Court has shot down that argument before with respect to the publication of criminal matters, and this was a great chance for Indiana to be open.

Kelly McBride asked how much victim information is available in these documents if they were posted online, and how victims might get access if the party is the State. The concern was that information being made inadvertently public even though identifying information might be redacted.

The Chief Justice said that she didn’t want to go forward too fast, then later have to draw back; her preference would be to move deliberately and build on that. She also mentioned that funding would be an issue for future years in that it isn’t set, and proceeding too fast and causing problems might impact that future funding. She asked the Task Force members to take the survey results back to their constituents and get additional feedback for making decisions at the next meeting.

The Chief Justice suggested that all orders in Infraction (IF), Local Ordinance Violation (OV), Small Claims (SC), Civil Collection (CC), Civil Tort (CT), Civil Plenary (PL), and Mortgage Foreclosure (MF) cases could be made fully accessible now, based on unanimous approval in the survey. This would allow a pilot of the process, and might help identify problems or issues that arise

from allowing access. A motion was made to do this, seconded, and voted upon. It carried unanimously. The remainder of the matters would be addressed at the July meeting.

Kathryn Dolan then discussed the messaging of e-filing and the email that went out to all attorneys. Roughly six or seven thousand attorneys and judges had opened the email. An additional message would go out soon regarding the posting of appellate motions effective July 1. The Chief Justice asked that if anyone had additional suggestions for messaging, that Task Force members please reach out to Kathryn. Steve Key said that the media members had similar all-contact lists if Kathryn wanted to utilize them.

B. Case financial records information

1. What case financial information is available in Odyssey courts: Report by Clerk Debbie Walker

Clerk Walker said that Odyssey does not post financial information—judgments, fees, court costs, etc.—but CSI counties on DoxPop and Court View do. Clerks vary on their actual practices, though.

2. Discussion: What case financial information should be available

The Task Force discussed the value in posting such information online, and the actual information posted was very broad a non-specific; e.g., it would not usually show the interest or the current total amounts. Mary DePrez talked about how Monroe County ran into issues when it went live with Odyssey, and it got sued because its financial data was not accurate. The financials were then immediately taken offline. There is currently about a fifty-fifty split on counties; some clerks want financial information posted online, because parties could find out, for example, how much they owed on a parking ticket. Others did not because, like in Monroe County, it might cause issues. The Chief Justice asked if that information could only be shown to attorneys and parties. Mary DePrez said it could be, as they built that distinct user capability.

Dave Powell said that if the issue was accuracy, then financial information should not be posted until the underlying data is correct. Clerk Walker said that if the data were posted, it would need a disclaimer telling viewers not to rely on the posted data because it will almost never be current and therefore never accurate. The Chief Justice asked Clerk Walker to ask her fellow clerks about how they would like to proceed as far as detail and distinction on types and amounts of financial data that would be posted.

IV. Issues for Discussion and Recommendation at July 29, 2016, meeting

The Chief Justice said that Justice David would lead the meeting on the July 29, and that there definitely would be a meeting on September 2. She asked that everyone come prepared – with input from their constituent organizations/individuals – to discuss the remaining case/document types.

V. Next Meeting Dates: *July 29, September 2*

VI. Adjournment: The meeting adjourned at 2:01 p.m.

Respectfully Submitted,

Justin P. Forkner
Deputy Director
Indiana Judicial Center / State Court Administration